IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27-1-2006

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Second Appeal No.278 of 1993

1. Thiruvenkada Gounder (died)
2. Rajambal
3. T.Dharman
4. Unnamalai ... Appellants(1st Defendant)

(Appellants 2 to 4 brought on record as LRs of the deceased sole appellant vide orders of the Court dated 25.8.2005 in C.M.P.Nos.16946 to 16948 of 2004)

Vs.

1. Ammaiappan @ Kothandaraman
2. Minor Balakrishnan (through Guardian mother and next friend Krishnaveni Ammal)
3. Sundaram
4. Elumalai (R4 exparte in the Lower Appellate Court, Hence not necessary Party in this Appeal. ... Respondents(Plaintiff & Defendants 2 & 3)

This second appeal has been filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 7.1.1992 in A.S.No.55 of 1990 on the file of the Sub Court, Tindivanam, reversing the judgment and decree dated 9.8.1990 in O.S.No.646 of 1985 on the file of the Additional District Munsif Court, Tindivanam.

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For Appellants : Mr.R.Ashokan

For Respondents 1&2 : Mr.T.Dhanasekaran for Mr.N.Maninarayanan

For 3rd Respondent : Mr.J.Sivaganesh

4th Respondent : N.D.W

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J U D G M E N T

First defendant in O.S.No.646 of 1985 on the file of the Additional District Munsif Court, Tindivanam, aggrieved by the judgment and decree of the learned Subordinate Judge, Tindivanam in A.S.No.55 of 1990 dated 7.1.1992, filed the present second appeal. During pendency of the second appeal, the first defendant died and hence his legal representatives were impleaded as appellants 2 to 4 vide orders of this Court dated 25.8.2005 in C.M.P.Nos.16946 to 16948 of 2004. Plaintiffs 1 and 2 and defendants 2 and 3 in the original suit are respondents herein.

2. The facts that are necessary for the disposal of the second appeal, as could be seen from the plaint and written statement, are as follows.

(a) The suit properties originally belonged to the joint family consisted of one Hariputhiri Gounder, the grandfather of the plaintiffs, and his sons Munusamy Gounder and Elumalai Gounder, the third defendant in this suit. In an oral partition, the western half of item No.1 of the suit property was allotted to the elder brother Munusamy Gounder and the eastern half was allotted to the third defendant Elumalai Gounder and they were enjoying their respective properties by paying kist, etc., separately. The suit second item is a well which was being enjoyed in common. The said Munusamy Gounder, by registered sale deed dated 27.7.1972, sold his share of western half of item No.1 in favour of one Dharmasivam, son of the first defendant. Subsequently, by the registered exchange deed dated 29.8.1972, first defendant on behalf of his minor son, and the third defendant on his behalf and on behalf of his minor son Kothandaraman, the first plaintiff herein, exchanged their respective shares in item No.1 of the suit property. From that date onwards, according to the plaintiffs, the entire extent of item No.1 was in the enjoyment of the joint family consisting of the third defendant Elumalai Gounder and his sons, the plaintiffs herein. Elumalai Gounder had also erected a cattle shed spending Rs.2,000/- in that property. The second defendant is the Uncle's son of Krishnaveni Ammal, the mother of the plaintiffs and he is close to the third defendant Elumalai Gounder, father of the plaintiffs. He, taking advantage of the weaknesses of the third defendant and with ulterior motive, got a sale deed registered in his favour on 28.11.1984 in respect of the suit properties. Subsequently, the second respondent secretly and in a hurried manner, created another sale deed dated 4.12.1984 to appear as if the suit properties were sold to the first respondent. As the documents were created behind the back of the plaintiffs and against the welfare of the joint family of the plaintiffs, the same will not bind the plaintiffs. It is the further alleged in the plaint that taking advantage of the alleged sale deed dated 4.12.1984, the first defendant on 12.3.1985

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entered into the suit property and attempted to heap the hayricks and tie his cattles in the cattleshed, which was prevented by the plaintiffs. The first defendant, using his money and muscle power, prevented even the plaintiffs to tie their cattles in the cattleshed. As the third defendant acted against the interest of the plaintiffs, they filed the suit for partition to divide the suit property into three equal shares and to allot 2/3rd share to them and also claiming Rs.30/- per months towards loss of rent in respect of their 2/3rd share from the date of suit till payment.

(b) In the written statement filed by the first defendant, he admitted that there was an oral partition between the third defendant and his elder brother Munusamy Gounder with regard to suit item No.1; that the Munusamy Gounder sold his share of the property to the first defendant; that the first and third defendants exchanged their respective share of the properties; and that, in view of the said exchange, the third defendant became entitled to the entire extent of suit item No.1. But the allegations in the plaint that the third defendant against the welfare of the joint family of the plaintiffs, without any necessity and misdirected by the second defendant, sold the suit properties to the second defendant and later the second defendant secretly and hurriedly created a forged sale deed on 4.12.1984, are categorically denied. According to the first defendant, neither the plaintiffs nor the third defendant could claim any right over the suit properties. The case of the first defendant is that during November, 1984, for the joint family necessity and to purchase oil engine, the third defendant required funds and for the said purpose, he requested the first defendant to purchase the suit properties for valid consideration, for which the first defendant gave his consent. To that effect, third defendant on his own behalf and on behalf of his minor sons, entered into an oral agreement with the first defendant on 24.11.1984 for a total consideration of Rs.5,250/- and obtained Rs.2,550/- as advance and delivered possession of the suit properties on that day itself. From that date onwards the first defendant is in possession and enjoyment of the suit properties. Two days later, the balance amount of Rs.2700/- was also obtained by the third defendant, with an undertaking to execute the sale deed at a later date. But contrary to the said oral agreement, the third defendant colluding with the second defendant, forged a sale deed dated 28.11.1984 to appear as if the suit properties were sold to the second defendant. On coming to know this, first defendant enquired into the matter and the second defendant executed a sale deed dated 4.12.1984 in favour of the first defendant in respect of the suit properties. The further case of the first defendant is that the third defendant without acting upon the agreement dated 24.11.1984, with a view to cheat the first defendant, in the name of his minor sons, the plaintiffs herein, filed the present suit. The mother of the plaintiffs Krishnaveni Ammal knows about the agreement

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between the first and third defendants and hence she cannot sustain the case on behalf of her minor sons, the plaintiffs herein. The first defendant also denied any incident on 12.3.1985 as alleged in the plaint. In fact, in the suit item No.1, there is no cattle shed but there is only a thatched hut, wherein one Annammal, the wife of the Munusamy Gounder is residing from 6.12.1984 by paying monthly rent of Rs.5/- to the first defendant. The said Annammal is a necessary party to this suit and as she was not impleaded, the suit is bad for non-joinder of necessary party. There is no cause of action for the suit and the cause of action alleged in the plaint is an imaginary one. Neither the plaintiffs, nor the third defendant have any manner of right over the suit properties, and consequently the plaintiffs cannot sustain the suit for the reliefs asked for.

3. During trial, the mother of the minor Plaintiffs Krishnaveni Ammal was examined as PW-1 and one Krishnan was examined as PW-2. On behalf of the plaintiffs, Exs.A-1 to A-5 were marked. The first defendant examined himself as DW-1 and one Ramachandra Gounder and Subbaraya Mudaliar were examined as DWs.2 and 3. Through them, Exs.B-1 to B-6 were marked. After considering the entire case in the light of the evidence placed before it, the Trial Court by its judgment dated 9.8.1990, came to the conclusion that the plaintiffs were not entitled to get any relief as claimed in the plaint and consequently dismissed the suit.

4. Aggrieved by judgment and decree of the Trial Court, the plaintiffs preferred A.S.No.55 of 1990 on the file of the Sub Court, Tindivanam. The learned Sub Judge, after reassessing the entire case and the materials available on record, by his Judgment dated 7.1.1992 allowed the appeal and set aside the decree and judgment of the trial Court.

5. The first defendant, not satisfied with the reversal of the judgment and decree of the Trial Court by the first appellate Court, filed the present second appeal. The second appeal was admitted on the following substantial questions of law,

> "1. Whether the lower appellate Court is right in allowing the suit for partial partition by minor-plaintiff, when there is no evidence that the partition is for the benefits of minor or for his interest ?
>
> 2. Whether the lower appellate Court is right in decreeing the suit, when the sale is for the legal necessity and for the benefit of the estate of the joint family ?"

6. Mr.R.Asokan, learned counsel appearing for the

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appellants/defendants contended that the third defendant, only for the benefit of his minor sons, on his own behalf and on behalf of the minors, entered into oral agreement on 24.11.1984 with the first defendant agreeing to sell the suit lands for a total consideration of Rs.5,250/- and obtained Rs.2,550/- as advance and delivered possession of the suit properties on that day itself and from the said date, the first defendant is in possession and enjoyment of the suit properties. He also argued that the balance amount was paid within two days thereafter with an undertaking to execute the sale deed at a later date. The learned counsel for the appellants/first defendant further submitted that the third defendant, without acting upon the oral agreement dated 24.11.1984, with a view to cheat the first defendant filed the present suit, in the name of his minor sons.

7. The learned counsel for the respondents/plaintiffs on the other hand contended that the first defendant has no right whatsoever to enter into the agreement with the third defendant as he is not owner of the property and his case that on behalf of the minors he had entered into an oral agreement, will not hold good in view of the fact that he had not obtained permission from the Court as required under Section 8(2) of the Hindu Minority and Guardianship Act, 1956 and in the absence of any such permission, the alleged agreement for sale cannot be sustained and the suit is to be decreed as prayed for and consequently the second appeal is liable to be dismissed.

8. I have considered the rival submissions made by the learned counsel for the appellants as well as the respondents. The point for consideration is as to whether the third defendant is entitled to enter into an agreement for sale in respect of his minor sons' share in view of the specific bar contained in section 8(2) of the Hindu Minority and Guardianship Act, 1956.

9. Section 8 of the Hindu Minority and guardianship Act, 1956 deals with the powers of the natural guardian. Sub-section (2) to section 8 reads as under,

> "8(2) The natural guardian shall not, without the previous permission of the court,-
> (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor; or
> (b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority."

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Admittedly, the third defendant had not obtained any permission from the Court as required under Section 8(2) of the Act. The only contention raised by the first defendant is that the sale agreement was entered into for raising funds for the legal necessity of the joint family and for the benefit of minor plaintiffs. On the contrary, the contention of the learned counsel for the respondents/plaintiffs is that the third defendant was a drunkard, leading immoral life and the sale agreement to the first defendant and the sale deed to the second defendant were executed by him, while he was under intoxication and no consideration was passed thereon. The character of the third defendant viz., the father of the plaintiffs, as found by the lower appellate Court is that he was a drunkard and was leading immoral way of life. As rightly contended by the learned counsel for the respondents 1 and 2, the third defendant, having not obtained permission from the Court to sell the property of his minor sons viz., Plaintiffs as required under section 8(2) of the Act, the same is voidable and consequently the suit filed by the mother on behalf of the minor plaintiffs is clearly maintainable.

10. The Honourable Supreme Court in the decision reported in 2002 (4) Law Weekly 330 (Madhegowda (D) by Lrs. v. Ankegowda (D) by Lrs & Others) in paragraphs 10, 11 and 12 held as under,

> "10. ... In Sub-section (1) of Section 8 it is declared that the natural guardian of a Hindu minor has power, subject to the provisions of the section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian in no case can bind the minor by a personal covenant.
>
> 11. In Sub-section (2) of Section 8 it is laid down that the natural guardian shall not, without the previous permission of the Court -
>
> (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or
>
> (b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.
>
> 12. In sub-section (3) in which the consequences of contravention of sub-section (1) or sub-section (2) are provided it is laid down that "any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at

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the instance of the minor or any person claiming under him"."

11. In the case on hand, it is not the case of the third defendant, that he had obtained prior permission from the Court to deal with the properties of the minor sons. Further it is not proved that the minors' property was dealt with for the benefit of the minors themselves. Hence this Court is of the view that the judgment of the lower appellate Court is correct and the dismissal of the suit by the trial Court is unsustainable.

12. In the result, the second appeal is dismissed and the judgment and decree of the lower appellate Court is confirmed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

vr

To

1. The Subordinate Judge, Tindivanam.
2. The Additional District Munsif, Tindivanam.
3. The Record Keeper,
   VR Section, High Court, Madras.

+1cc to Mr.R.Ashokan, Advocate Sr 3195

PV (CO)
km/21.2.

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